

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
IP – Enabled Services)	WC Docket No. 04-36
)	
Petition of SBC Communications Inc.)	WC Docket No. 04-29
For Forbearance)	
_____)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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SUMMARY

The immediate future of communications services is undoubtedly tied to the continued development and use of Internet Protocol (IP) to provide revolutionary services. The market for IP-enabled services is already highly competitive and companies are continuing to develop new technologies for providing these services, accelerating such competition. Accordingly, the premise from which the Commission should begin its evaluation in this proceeding is that IP-enabled services should be minimally regulated, with parity in regulation applied to all providers of IP-enabled services, including meeting social obligations. This premise requires the Commission to base its decisions on several core principles – that in a competitive market such as this one, companies must be free to operate under market rules, not hindered by economic regulation; that to the extent IP-enabled services are regulated, similar services must be treated similarly; and that all IP-enabled service providers should help meet important social goals such as in maintaining universal service, ensuring that law enforcement authorities can meet public safety needs, providing all Americans with access to 911 services, facilitating for disabled citizens the opportunity to use communications networks, and complying with other consumer protection measures.

The Commission can achieve these core goals through different regulatory paths, exercising its authority under both Title I and Title II (because some services using IP technology may be information services, while others are definitively telecommunications services), to ensure both economic deregulation and protection of important social goals. Whatever regulatory treatment is appropriate, the Commission must ensure that all IP-enabled services are treated similarly with regard to economic regulation, or lack thereof, and imposition of social obligations. For IP-enabled services that are deemed telecommunications services

under Title II, the Commission should forbear from economic regulation, including finding that ILEC provided Voice over Internet Protocol (VoIP) services are non-dominant. For IP-enabled services that are deemed information services under Title I, the Commission should deregulate and waive the *Computer Inquiry* requirements, provide ILECs with the option to continue operations under a regulatory environment for purposes of remaining in NECA pools, require all IP-enabled service providers to pay access charges when such services touch local public switched telephone networks, and require providers of IP-enabled services competing with providers of telecommunications services to similarly contribute to universal service and comply with other social obligations.

Finally, the Commission should find that the VoIP market is interstate in nature and thus not subject to state regulation. Uniformity in regulation, not regulation under 50 disparate state authorities, will provide the regulatory clarity that will foster continued development and use of VoIP and other IP-enabled services.

IP-enabled services are the direction of communications today and tomorrow. Certainly there will be other technological developments that will move communications beyond the present IP-enabled services. The Commission's actions in this proceeding will have significant import not only for the immediate future of IP-enabled services, but also for the development and regulatory treatment of future communications services relying on even newer technological break-throughs. USTA urges the Commission to ensure that the regulatory environment it applies to IP-enabled services will foster continued technological innovation and market-based competition.

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The United States Telecom Association (USTA)¹ submits its comments through the undersigned and pursuant to the Federal Communications Commission’s (FCC’s or Commission’s) Notice of Proposed Rulemaking (NPRM) and SBC Communications Inc.’s Forbearance Petition (SBC Petition) in the above-referenced dockets.

IP-enabled services are “revolutionary.”² They will bring tremendous innovation and savings to consumers, and they will bolster economic productivity and growth. Moreover, traditional wireline ILECs do not even arguably have “bottleneck” control over the facilities used to provide these services. Rather, IP-enabled services can be provided over a wide variety of broadband transmission facilities – including cable, wireline, wireless, and, soon, power lines – and they can be provided by companies that do not own or even lease the underlying facilities, but simply sell applications that ride on those facilities.

¹ USTA is the nation’s oldest trade organization for the local exchange carrier industry. USTA’s carrier members provide a full array of voice, data, and video services over wireline and wireless networks.

² *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28, ¶ 5 (rel. Mar. 10, 2004) (NPRM).

For these reasons, the proper Commission response, as suggested by the NPRM itself, is to start from the “premise that IP-enabled services” should be “minimally regulated” and that “competitive developments in the marketplace” should “play the key role once played by regulation.”³ A core aspect of any scheme of minimal regulation must be a commitment to regulatory parity, so that all providers are treated equally regardless of the transmission technology they use or their treatment under legacy regulation. Otherwise, the Commission, not consumers, will be picking winners and losers in the marketplace, and its actions will encourage inefficient arbitrage. While *economic* regulation is counterproductive here, however, there are *social* priorities – including, among other things, universal service, access to emergency services, assistance to law enforcement, and disabilities access – that are not changed by this new technology and that the Commission can and should preserve.⁴

Part I of these Comments develops the basic principles that must guide all Commission determinations in this area. Part II demonstrates that the Commission can achieve these goals both for services that qualify as telecommunications services subject to Title II and for those that may be information services subject to Title I. Part III explains why the Commission must assert exclusive jurisdiction over these interstate services and thus preempt state regulation. Finally, Part IV details the ways in which the Commission can ensure that all providers meet their social responsibilities in the new age of IP-enabled services.

³ *Id.*, ¶¶ 4, 5.

⁴ *See id.*, ¶ 5.

I. THE COMMISSION'S DETERMINATIONS SHOULD BE GUIDED BY A SET OF CORE PRINCIPLES DESIGNED TO ENSURE MARKET COMPETITION AND TO PRESERVE IMPORTANT SOCIAL GOALS

Along with the enormous benefits of IP-enabled services will doubtless come a large number of regulatory questions. The Commission will be called upon to determine whether each aspect of the existing edifice of regulation should apply to the new IP-enabled services world, and, if so, how.

In analyzing each of the issues that arise, the Commission should be guided by a few basic principles. The Commission's decisions should uniformly be grounded in (1) the power of free markets to unleash innovation and bring benefits to consumers; (2) the need to treat all service providers even-handedly so as not to pick winners and losers through regulation; and (3) the imperative of protecting important social goals, including universal service, access to emergency services, and disability access.

A. The Market, Not Economic Regulation, Will Bring Innovation and Efficiency to Consumers

It's this simple: free markets are better than regulators in responding to consumers' needs. Chairman Powell put this fundamental truth well when the Commission issued its NPRM: "Competitive market forces, rather than prescriptive rules, will respond to public need much more quickly and more effectively than even the best intentioned responses of government regulators."⁵ Accordingly, "our best hope for continuing the investment, innovation, choice and competition that characterizes Internet services today lies in limiting to a minimum the labyrinth of regulations and fees that apply to the Internet. All too often, these edicts can thwart

⁵ NPRM, Statement of Chairman Michael K. Powell.

competition even among traditional telecommunications providers.”⁶ Other Commissioners have properly recognized this same core point.⁷

Because a free market is the best way to bring value to consumers, it is no surprise that the great success stories of innovation, including the Internet and wireless, are in areas where the Commission has not imposed heavy-handed regulation. The Commission has long declared the “strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet – which has flourished under our ‘hands off’ regulatory approach – or the development

⁶ *Id.*

⁷ “I believe that competition is preferable to regulation. Market forces are the best method of delivering choice, innovation, and affordability to consumers across our nation. But that does not mean that the Commission has no role to play. The Commission has an important role to play in creating an environment in which competition can flourish. And where there are market failures, the Commission may need to step in and take action.” Press Statement of FCC Commissioner Kevin J. Martin on the Commission’s Decision on Verizon’s Petition for Permanent Forbearance from Wireless Local Number Portability Rules (July 16, 2002).

“[T]o the greatest extent possible, we should let innovation and the marketplace drive the development of spectrum-based services. My goal is to maximize the amount of communications and information that flow over the Nation’s airwaves, on earth and through space.” Jonathan S. Adelstein, Commissioner, FCC, *Accessing the Public Interest: Keeping America Well-Connected*, Remarks Before the 21st Annual Institute on Telecommunications Policy & Regulation, Washington, D.C. (Dec. 4, 2003).

“In essence, I’ve concluded that the force of an efficient marketplace is generally more effective than regulation in prompting firms to offer better services at lower prices. When dealing with a well-functioning market, regulators can do the most good when they simply allow the market to work to its best effect. Under these circumstances, maximizing consumer welfare demands that regulators resist adopting prescriptive regulation, and act only where structural barriers to competition exist, where legislation or overriding policy priorities require it, or where market forces fail to protect the public interest.” Kathleen Q. Abernathy, Commissioner, FCC, *Regulating Wireless: How Much and by Whom*, Luncheon Remarks, AEI-Brookings Joint Center for Regulatory Studies, Washington, D.C. (May 13, 2004) (Commissioner Abernathy’s May 13 Remarks).

of competition.”⁸ And, over the last decade, market innovators have responded to the regulatory certainty created by this policy by bringing consumers a dazzling array of services and information over the Internet, from travel reservations to financial news to movie tickets.⁹ Similarly, wireless has been a great success story, with customers receiving lower prices, more attractive deals, and new features seemingly every month, precisely because companies have been allowed the freedom to innovate and to respond to what consumers want unshackled by unnecessary regulation.¹⁰

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, ¶ 6 (1999).

⁹ See, e.g., Michael J. Copps, Commissioner, FCC, *The Beginning of the End of the Internet? Discrimination, Closed Networks, and the Future of Cyberspace*, Remarks Before the New America Foundation, Washington, D.C. (Oct. 9, 2003) (“The Internet has already accomplished so much. It has become an engine of economic growth. A tool of education. A health provider. An entertainer. It will change the ways we govern ourselves and grow to be, I believe, a dynamic force against political oppression in regimes that are now closed. The power of the Internet resides, as its founders foresaw, in its decentralization. There is no central headquarters through which every communication is forced to pass. Millions of dialogues occur simultaneously. People share news, information and experiences from anywhere to anywhere because even if they aren't connected to each other, even if someone tries to interrupt a certain connection, they can route from open node to open node around the globe to find one another. It's more than just empowering. It may be the best and most democratic public forum that has ever existed. . . . The Internet developed this way in large part because it was allowed to grow without either governments or monopolies stifling its openness and connectivity.”).

¹⁰ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Eighth Report, 18 FCC Rcd 14783, ¶95 (2003) (“Another trend in mobile telephone pricing has been the introduction of on-network, or ‘on-net,’ national pricing plans. . . . We believe that such pricing plans, broadly similar across operators, are the results of competitive market forces and competitive conduct.”); Commissioner Abernathy’s May 13 Remarks (“The wireless industry by all accounts is a hotbed of competition, demonstrating how market-based solutions can best serve customers. Because of competition, per-minute prices for mobile calling have dropped steadily for nearly a decade, declining 76% since 1994 – 30% in the past 3 years. At the same time, carriers have invested over \$126 billion in their networks, thus improving service, creating jobs, and spurring economic growth. . . . Wireless carriers have nimbly responded to consumer

Because the benefits of reliance on the market are so clear, the Commission should displace it through economic regulation *only* where there is a clear market failure that necessitates intervention. Far from exhibiting any signs of such a market failure, however, all the evidence shows that the market for IP-enabled services is highly competitive with low barriers to entry and no “bottleneck” that could even arguably warrant economic regulation.

There are already a large variety of providers of IP-enabled services. These include each of the six largest cable operators that have either deployed IP telephony or plan to do so imminently.¹¹ These six providers alone reach 85% of American households, and analysts estimate that they will be providing IP telephony to 5 million customers by 2006.¹² Just this week, Comcast, the nation’s largest cable operator, announced plans to offer VoIP service to 20 million households by the end of 2005 and to 40 million households by the end of 2006, after finding that its Boston and Minneapolis test markets “performed better than anticipated.”¹³

preferences, and as a result, the public has increased its use of and reliance on wireless networks for basic voice communications, for news and information through Internet services, and even for entertainment.”).

¹¹ Peter W. Huber and Evan T. Leo, *Competition in the Provision of Voice Over IP and Other IP-Enabled Services* (prepared for and submitted by BellSouth, Qwest, SBC, and Verizon for the FCC proceeding *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28, (rel. Mar. 10, 2004)) (May 28, 2004) at 5 (VoIP Fact Report).

¹² *Id.*, Table 2.

¹³ *Comcast Pushes Into Phone Service: Rollout of a VoIP Product Heats Up Cable’s Turf War With Telephone Companies*, The Wall Street Journal (May 26, 2004) (“Comcast’s VoIP plans also set the stage for another big battle between the cable and telephone industries, which already are fighting for the high-speed Internet market. . . . the entry into the business by the Philadelphia-based giant, which has more than 21 million cable-TV subscribers, should heighten the competition by increasing consumer awareness, driving down manufacturing costs of VoIP equipment and encouraging vendors to develop new features, analysts say.”).

Traditional interexchange carriers (IXCs) and competitive local exchange carriers (CLECs) are also rolling out VoIP rapidly. AT&T alone has committed to deploy mass-market VoIP in the top 100 MSAs by the end of 2004, and has already begun providing service in [19] of those markets.¹⁴ AT&T plans to have 1 million VoIP subscribers this year.¹⁵ MCI, Z-Tel, Level 3, and other CLECs are likewise launching VoIP initiatives.¹⁶ ILECs are also developing their own IP-enabled products.¹⁷

Of course, upstart VoIP providers, such as Vonage, are now offering service nationwide as well. Vonage alone is offering service in at least 1,900 rate centers in 120 markets.¹⁸ It has at least 155,000 customers and is adding more than 20,000 lines per month.¹⁹ Companies such as Pulver and Skype, which, like Vonage, do not own or lease the underlying transmission facilities,

¹⁴ See AT&T Press Release, *AT&T's CallVantage Service Expands to Boston Area* (Apr. 26, 2004); see also VoIP Fact Report at 8.

¹⁵ See AT&T News Release, *AT&T's CallVantage Service Expands To Serve the Western United States*, (May 17, 2004); see also VoIP Fact Report at 8.

¹⁶ See MCI Press Release, *MCI Provides 2004 Financial Guidance* (Jan. 22, 2004), Z-Tel Press Release, *Z-Tel Announces First Quarter 2004 Financial Results* (May 13, 2004), Level 3 Press Release, *Level 3 Launches Residential VoIP Service in More than 50 U.S. Markets* (May 3, 2004); see also VoIP Fact Report at 8-9.

¹⁷ See VoIP Fact Report at 10-11.

¹⁸ See Vonage, *About Vonage: Fast Facts*, http://www.vonage.com/corporate/aboutus_fastfacts.php; see also VoIP Fact Report at 9.

¹⁹ See Vonage Press Release, *Vonage Drops Residential Premium Unlimited Plan by \$5 to \$29.99* (May 17, 2004); see also VoIP Fact Report at 9.

are also offering free computer-to-computer services over the Internet at levels of quality that Chairman Powell has called “fantastic.”²⁰

The economics of these services indicate that even more new entrants are likely to emerge and that usage will continue to grow rapidly. Because an IP-enabled service provider need not own or lease the underlying broadband transmission facilities, barriers to entry are low. And the incremental cost of offering the service to an existing broadband customer is slight (in the range of \$5 to \$9 per month), such that these services can be priced at rates far below current circuit-switched offerings.²¹ Indeed, today, VoIP generally costs 30% to 40% less than circuit-switched services, which explains why it is such an effective threat to those services.²²

VoIP is also bringing innovative features to consumers today, with much more on the way in the near future. AT&T’s CallVantage, for instance, offers “multiple advanced features such as call logs, unified messaging, settable do-not-disturb periods, ‘locate me’ functionality, and virtual conference call functionality.”²³ VoicePulse offers an “‘Open Access’ plan, which allows subscribers to use the service via any appropriately configured device such as a PDA, laptop, or IP phone.”²⁴ Analysts expect an even wider array of features to be introduced in the

²⁰ See VoIP Fact Report at 9-10, *quoting* D. Roth, *Catch Us if You Can*, *Fortune* (Feb. 9, 2004).

²¹ See *id.* at 14.

²² See *id.*

²³ L. Warner, *et al.*, Credit Suisse First Boston Equity Research, *AT&T Launches VoIP in New Jersey: Competition for Voice Customers Accelerating* at 1 (Mar. 29, 2004).

²⁴ J. Barrett, Park Associates, *Residential Voice-over-IP: Analysis & Forecasts* at 4-6 (Jan. 2004).

future, as VoIP services become more integrated with data and video.²⁵ As Vonage explains, “The velocity of innovation VoIP entails is amazing. Vonage has been deploying a new service feature every six weeks, on average (which it can achieve with a software push to the adapter). This compares to as much as a year or more in the traditional incumbent environment.”²⁶

It is also important to remember that ILECs are secondary providers of the broadband transmission services on which IP-enabled services ride. The Commission’s most recent data shows that cable serves more than two out of every three broadband customers, and that its lead continues to grow.²⁷ Even more recent information provided in the VoIP Fact Report shows that cable continues to add more lines than wireline broadband, even though wireline providers have slashed rates.²⁸ The Commission has thus properly concluded that this market is not one in which ILECs have any inherent advantage.²⁹ As Commissioner Martin recently stressed, “the

²⁵ See VoIP Fact Report at 24.

²⁶ D. Barden, *et al.*, Banc of America Securities Equity Research, *Straight Talk on VoIP* at 3 (Apr. 15, 2004).

²⁷ See *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Tables 3 and 4 (Dec. 2003) (over 200 kbps in at least one direction: 13.7 million cable modem lines, 6.4 million ADSL lines; over 200 kbps in both directions: 11.9 million cable modem lines, 2.1 million ADSL lines).

²⁸ See VoIP Fact Report, Appendix A, Tables 1 and 4.

²⁹ See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶51 (2003) (*Triennial Review Order*).

growth of cable broadband and DSL lines has resulted in fierce competition between these services, with cable still significantly ahead of its telco competitor.”³⁰

These points, as well as others that are developed in greater depth in the VoIP Fact Report, demonstrate that the market for IP-enabled services is an extremely healthy one that is bringing, and will continue to bring, cost savings and innovation to the American public. It is thus the sort of market for which economic regulation – or the threat thereof – can cause enormous harm by undermining investment incentives and increasing costs, all without any countervailing benefit. That fact must be central to the Commission’s determinations in this docket.

B. The Commission Must Treat Like Services Alike

A central part of a policy of relying on the market to determine winners and losers in IP-enabled services is to ensure that the Commission, through asymmetrical regulation, does not tilt the playing field against some companies. Rules that place regulatory burdens on some providers, but not on their competitors, hurt both competitors and consumers. They risk causing less efficient or less innovative companies to prevail because of artificial competitive advantages. And they encourage inefficient arbitrage: companies will adopt certain technologies not because they are more efficient, but rather because that will allow them to avoid a regulatory obligation (such as support of universal service) that their competitors must bear.

To avoid these results, the Commission should ensure that all providers of IP-enabled services have the same regulatory obligations, regardless of the technology or transmission

³⁰ Kevin J. Martin, Commissioner, FCC, Remarks to the NARUC Conference, Washington, D.C. (Mar. 8, 2004).

media they use. Indeed, in the *Wireline Broadband* and *Broadband Non-Dominance* dockets,³¹ the Commission has long been considering ways to level the regulatory burdens of broadband transmission providers. The Commission should act on those issues promptly to erase the unfair disadvantages that wireline broadband providers face when they compete with cable modem providers.³²

Indeed, avoiding asymmetrical regulation is not just sound policy; it is the Commission's duty. In passing the 1996 Act, Congress specifically concluded that a scheme of what it termed "regulatory apartheid" "no longer makes sense."³³ Rather, since "[a] movie, phone call, letter, or magazine article may be sent digitally via phone line, coaxial cable, fiber-optic cable, microwave, satellite, [or] the broadcast air,"³⁴ Congress intended the Commission to reach beyond technological categories and apply the same regulations to all services that are functionally alike. The Commission itself has thus emphasized that the 1996 Act is "technologically neutral" and that regulations should not discriminate against or burden

³¹ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10 (rel. Feb. 15, 2002) (*Wireline Broadband NPRM*) and *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337 (rel. Dec. 20, 2001) (*Broadband Non-Dominance NPRM*).

³² See *Wireline Broadband NPRM; Broadband Non-Dominance NPRM*.

³³ 141 Cong. Rec. S7885 (daily ed. June 7, 1995) (statement of Sen. Pressler, Chief Senate Sponsor of the 1996 Act).

³⁴ *Id.*

particular technologies.³⁵ In the same vein, Chairman Powell has long emphasized the need for regulators to “work to harmonize regulatory treatment in a manner consistent with converged technology and markets. . . . Additionally, we must recognize that the Digital Migration involves every segment of the communications industry (*i.e.*, telephone, cable, broadcast, wireless, and satellite) and *none should be examined in isolation*.”³⁶ Simply put, as the Commission has stated, “[t]he requirements of regulatory parity require similar services to be treated similarly.”³⁷

In the past, when the Commission has failed to treat like services alike, and has looked instead to the legacy regulation of a particular carrier, the courts and Congress have quickly overturned its actions. For instance, when the Commission sought to regulate dark fiber provision on a common carrier basis, not because of the characteristics of the service offering, but simply because of the identity of the provider, the D.C. Circuit vacated its decision. As the court explained, “[w]hether any entity in a given case is to be considered a common carrier” turns not on its historical status, but rather “on the particular practice under surveillance.”³⁸

³⁵ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385, 386, ¶2 (1999); see also *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11548, ¶98 (1998) (“We are mindful that, in order to promote equity and efficiency, we should avoid creating regulatory distinctions based purely on technology.”).

³⁶ Michael K. Powell, Chairman, FCC, *The Great Digital Broadband Migration*, Remarks Before the Progress & Freedom Foundation (Dec. 8, 2000).

³⁷ *Application for Review of BellSouth Wireless, Inc. Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Memorandum Opinion and Order, 12 FCC Rcd 14031, ¶14 (1997).

³⁸ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *Federal-State Joint Board on Universal Service*, Order on Remand, 16 FCC Rcd 571, 574, ¶10 (2000); *Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, Memorandum Opinion and Order on Reconsideration, 2 FCC Rcd 3035, 3060-61, ¶179 (1987).

Similarly, after the Commission refused to place Nextel's "private" wireless service on the same regulatory footing as functionally equivalent "public" service, Congress enacted legislation to "achieve regulatory parity among services that are substantially similar," and to ensure that "equivalent mobile services are regulated in the same manner."³⁹ And when the Commission still refused to regulate PCS in the same manner as cellular service, the Sixth Circuit overruled it.⁴⁰ More recently, of course, when the Commission decided to require linesharing by wireline providers without looking at the entire broadband market and the fact that cable was the market leader, the D.C. Circuit found the Commission's decision to be irrational and contrary to the 1996 Act; the court specifically faulted the Commission for acting in "disregard of the competitive context."⁴¹

Moreover, the Commission itself has recently recognized the anti-competitive effects of such asymmetrical regulation, and in particular how such rules encourage companies to compete not on the merits, but through arbitrage and regulatory gamesmanship. For instance, in deciding that AT&T should pay access charges just like any other IXC regardless of whether it chose to use IP protocol for some of its interexchange transmission, the Commission stated that any other result would create "artificial incentives for carriers to convert to IP networks. Rather than

(*Computer III Reconsideration Order*) ("The courts and this Commission have held consistently that a firm's status as a common carrier is defined in terms of the manner in which it offers particular services. Thus, firms like the BOCs are not common carriers with respect to each communication service they offer, simply because they provide some services on a common carrier basis.").

³⁹ H.R. Rep. No. 103-111, at 259-60 (1993) (discussing Pub. L. No. 103-66, tit. VI, § 6001(a), 107 Stat. 312 (1993)).

⁴⁰ *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

⁴¹ *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002).

convert at a pace commensurate with the capability to provide enhanced functionality, carriers would convert to IP networks merely to take advantage of the cost advantage [of avoiding access charges] *IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges.*⁴²

Similarly, the Commission has emphasized that universal service obligations should apply equally to avoid artificial competitive advantages. As the Commission explained, it seeks to “reduce[] the possibility that carriers with universal service obligations will compete directly with carriers without such obligations.”⁴³

All these precedents establish that competition on the merits is best served, and arbitrage best avoided, when the Commission adopts even-handed rules that treat like services alike regardless of transmission media or legacy regulation. That insight is directly relevant here, where a core part of the Commission’s task will be to treat ILEC IP-enabled service providers the same as cable providers, wireless providers, power companies, and upstart application providers that are offering service over all those platforms.

C. The Commission Must Preserve Enduring Social Priorities

Although technologies and markets do change, and properly lead regulators to dispense with *economic* regulations that have become inappropriate and counterproductive, there are significant *social* priorities that do not change. As the Commission properly moves to ensure that it does not impose harmful economic regulation, it should be equally vigilant in preserving

⁴² *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361, FCC 04-97, ¶18 (rel. Apr. 21, 2004) (emphasis added) (*AT&T Declaratory Ruling*).

⁴³ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9183-9184, ¶ 795 (1997).

(and where necessary expanding to new providers) rules that serve the important social goals that have been codified in federal law. In accord with the Commission's duty to treat like services alike, it must ensure that these same duties apply equally to all providers of competing IP-enabled services.

The importance of providing all Americans with universal access to quality and advanced telecommunications and information services cannot be overstated. Universal service support allows eligible carriers providing service to the most rural and high-cost areas of the country to build networks that connect their customers to the rest of the nation and the world. This support also allows such carriers to offer diverse services and to charge affordable rates that are comparable to those available in other parts of the country. Without a universal service cost-recovery mechanism, services in rural and high-cost areas would be limited and rates would be prohibitive. The Commission must preserve universal service support as a means of maintaining current infrastructure and creating a more robust nationwide network that provides the foundation for quality and advanced telecommunications and information services. To ensure preservation of the Universal Service Fund, support must be provided for all lines, not just primary lines; support must be based on the cost of ILECs' networks; and the ETC designation process must be strengthened.

The Communications Act makes explicit Congress's view that this Commission must ensure that "[q]uality services should be available at just, reasonable, and affordable rates," and that there must be "specific, predictable, and sufficient Federal . . . mechanisms to preserve and advance universal service."⁴⁴ These duties have enormous practical importance for millions of

⁴⁴ 47 U.S.C. §254(b).

Americans. As the Commission has explained, “the absence of telecommunications service in a home puts its occupants at a tremendous disadvantage in today’s society. Parents cannot be reached when urgent situations arise at school. Job seekers cannot offer prospective employers a quick and convenient means of communication. People in immediate need of emergency services cannot contact police departments, fire departments, or medical providers. In short, telephone service provides a vital link between individuals and society as a whole.”⁴⁵

Of course, the Commission will not be able to meet these goals if providers of IP-enabled services that replace traditional voice service do not have the same obligations as LECs to contribute to universal service. Under such a regime, every time a customer switched from a traditional circuit-switched service to an IP voice service, the base of universal service support would become smaller and less “sufficient.” Over the next few years, the base of consumers supporting universal service would be whittled away by tens of millions of customers. And, of course, if IP-enabled service providers do not have universal service obligations, they will have an artificial cost advantage that will make it even easier to siphon off ever more customers from the wireline providers that are supporting universal service.

For these reasons, it is crucial that the Commission ensure that universal service obligations apply to IP voice providers (whether regulated under Title I or Title II) just as they do for traditional voice providers. USTA cannot put this point any better than Commissioner Adelstein has recently: “It’s absolutely crucial to understand how VoIP affects universal service. If VoIP providers are not required to contribute, it creates an opportunity for regulatory arbitrage

⁴⁵ *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Further Notice of Proposed Rulemaking, 14 FCC Rcd 21177, ¶¶1-2 (1999).

and further undermines the already troubled funding mechanism. If VoIP is the future, then the steps we take now must ensure universal access to the best services available. I disagree with those who say that the advent of VoIP obviates the need for universal service funding. VoIP rides over the same connections rural communities have worked so hard to establish. . . . We cannot afford to let the rise of VoIP undercut the very networks that facilitate it. IP services can't reach their potential unless there is infrastructure in place to support them.”⁴⁶

Of course, the social priorities that the Commission must preserve are not limited to universal service. Rather, they involve ensuring law enforcement authorities with appropriate access to telecommunications networks to ensure public safety. They also involve mandating access to E911 so that all Americans will have the benefit of quick police, fire, and rescue response in the case of an emergency. They involve our nation's continued commitment to allowing disabled citizens the opportunity to use communications networks, as reflected in section 255. And they also involve consumer protection from slamming and improper use of CPNI.

All of these priorities, which are discussed in more detail in Part IV of these Comments, can and must be protected as we move to the age of IP-enabled services. As Chairman Powell has explained, “[w]hile IP-enabled services should remain free from traditional monopoly regulation, rules designed to ensure law enforcement access, universal service, disability access,

⁴⁶ Jonathan Adelstein, Commissioner, Federal Communications Commission, *Rural Telecommunications - Big Challenges and Bigger Opportunities*, Remarks Before the 2004 NTCA Legislative and Policy Conference, Washington, D.C. (Mar. 22, 2004).

and emergency 911 service can and should be preserved in the new architecture.”⁴⁷ The Commission has the tools to preserve those rules, and to expand them in a manner consistent with treating like services alike, regardless of whether a particular IP-enabled service fits under Title I or Title II.

II. THE COMMISSION CAN ACHIEVE THESE CORE GOALS THROUGH DIFFERENT REGULATORY PATHS

IP-enabled services “will likely come in many varieties.”⁴⁸ All these varieties of services may not fit neatly in the same statutory category – a result that is hardly surprising, as these categories far predate the growth of IP technologies. Some IP-enabled services are certainly

⁴⁷ NPRM, Statement of Chairman Michael K. Powell. Other Commissioners similarly emphasized the importance of preserving these priorities:

Commissioner Abernathy: “As most policymakers at the federal and state level have recognized, we will need to find solutions to guarantee access to 911 services, the ability of law enforcement agencies to conduct surveillance, the preservation of universal service, and access by persons with disabilities. Some of these goals may well be achieved without heavy-handed regulation, but I am willing to support targeted governmental mandates where necessary.” Statement of Commissioner Kathleen Q. Abernathy, *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (rel. Mar. 10, 2004).

Commissioner Copps: “After two years of dialogue on classifying, reclassifying and declassifying services, in this proceeding the Commission finally focuses on the consequences of a Title I approach on a whole range of public safety, emergency response, universal service and disabilities access policies that we have a duty to protect. I have long advocated that we do this.” Statement of Commissioner Michael J. Copps, *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (rel. Mar. 10, 2004).

Commissioner Adelstein: “The Act charges us to maintain universal service, which is crucial in delivering communications services to our nation’s schools, libraries, low income consumers, and rural communities. We will need to look closely at how IP-enabled services affect our ability to fund and deliver those services. The support that our universal service programs bring to our nation’s rural communities is critical.” Statement of Commissioner Jonathan S. Adelstein, attached to *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (rel. Mar. 10, 2004).

⁴⁸ NPRM, ¶16.

telecommunications services that are subject to Title II. Other services incorporate enhanced functionalities and thus may be information services subject to Title I. In the end, however, under both those statutory regimes, the Commission has the authority to create a deregulatory regime that gives parity of treatment to equivalent services and preserves important social policy goals.

Indeed, given the likelihood that there will be, at the least, confusion around the edges about which services fit in which regulatory box (confusion that may be enhanced if the Ninth Circuit's decision in *Brand X Internet Services v. FCC*⁴⁹ becomes the law), the Commission should exercise its authority under both Title I and Title II to ensure both economic deregulation and protection of important social goals.

A. Some Services Using IP Technology Are Telecommunications Services

Some providers use IP as simply another form of transmission technology. They replace circuit switches with packet switches and provide the same service that they were otherwise offering. The service considered in the recent *AT&T Declaratory Ruling* is one example of this phenomenon. There, end users were not receiving anything different than they would with AT&T's circuit-switched interexchange service: "End-user customers do not order a different service, pay different rates, or place and receive calls any differently," and AT&T did not provide customers with any "enhanced functionality."⁵⁰ AT&T's service was thus a telecommunications service, as the Commission properly held.⁵¹

⁴⁹ *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

⁵⁰ *AT&T Declaratory Ruling*, ¶¶12 and 13.

⁵¹ *See id.*

There may well be other cases where providers are simply offering a telecommunications service using a new technology and no enhanced functionalities. In those circumstances as well, the use of packet-switched IP technology instead of circuit-switched technology does not change a telecommunications service into an information service. Just as on the circuit-switched network, these providers are offering transmission of voice telephony “without any change of the form or content of the information as sent and received”; if they are doing so on a common-carrier basis, that is a telecommunications service regardless of the use of IP technology.⁵² As the Commission has stated, a “telecommunications service is a telecommunications service regardless of whether it is provided using wireline, cable, satellite, or some other infrastructure,” and “its classification depends . . . on the service being offered to customers.”⁵³

B. Other Services Using IP Technology May Be Information Services

The Telecommunications Act defines an information service as a service that offers a “capability for generating, acquiring, storing, transforming, retrieving, utilizing, or making available information via telecommunications.”⁵⁴ Some IP-enabled services may meet this definition. The Commission already determined that one form of IP-enabled service, Pulver’s Free World Dialup (FWD) was an information service because, among other things, it allowed members to “acquire” information about whether other members were online, “stored” member information and voicemail messages, provided members with passwords and other information

⁵² 47 U.S.C. §153(43) (defining “telecommunications”); *see also* 47 U.S.C. §153(46) (defining “telecommunications service”).

⁵³ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶59 (1998) (Report to Congress).

⁵⁴ 47 U.S.C. §153(20).

that they “utilize,” and “processed” information to determine whether the person with whom a member seeks to communicate is online and available.⁵⁵

Other uses of IP technology will, like Pulver’s FWD service, allow for the manipulation and storage of information. Under the Commission’s analysis, those services may also qualify as information services. It is far from clear, however, where the precise statutory line will be drawn in this context. Accordingly, as discussed below, the Commission should take steps to ensure that competing services will be treated equally regardless of whether they fall in the category of “IP-enabled information services” or the category of “IP-enabled telecommunications services.”

C. Under Either Statutory Category, the Commission Should Exercise Its Authority in a Way that Creates an Even-Handed Regime that Imposes Minimal Economic Regulation and Preserves Social Priorities

1. Telecommunication Services

If an IP-enabled service is classified as a telecommunications service under the Act, Title II regulation in some form or another would apply absent action from this Commission. Given the highly competitive nature of IP-enabled services and the lack of any “bottleneck” monopoly, legacy regulatory frameworks would be inappropriate and counterproductive here. Accordingly, the Commission should (1) forbear from Title II economic regulation of these services and (2) declare that ILECs are non-dominant in the provision of these services.

⁵⁵ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, ¶11 (rel. Feb. 19, 2004) (*Pulver Order*).

a. The Commission Should Forbear from Title II Economic Regulation for IP-Enabled Services.

In the context of IP-enabled services that qualify as telecommunications services, Section 10 forbearance of Title II economic regulation is warranted in order to achieve the goals of the Telecommunications Act of 1996 “to reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies.”⁵⁶

Section 10(a) provides that:

The Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier . . . if the Commission determines that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with the telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.⁵⁷

All three of the Section 10 criteria apply here and warrant forbearance from Title II regulations.

The first prong of the Section 10 test requires that the Commission determine that the regulation at issue is not necessary to ensure just and reasonable charges and practices. As discussed above in Part I and in the VoIP Fact Report, the IP market is highly competitive.

⁵⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. *See also* 47 U.S.C. §230(b)(2) (stating the policy of the United States is to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”) and 47 U.S.C. §157(a) (requiring the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” using “methods that remove barriers to infrastructure investment” including “regulatory forbearance”); *see also Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11540, ¶82 (1998) (recognizing the “unique qualities of the Internet” and noting that “we do not presume that legacy regulatory frameworks are appropriately applied to it”).

⁵⁷ 47 U.S.C. §160(a).

Burgeoning competition exists between providers that utilize cable, wireline, and fixed wireless technologies, among others.⁵⁸ Soon, electric power line companies will be providing a transmission source for VoIP.⁵⁹ And providers such as Vonage can compete without owning or leasing any of the underlying facilities. This is thus a competitive market in which competition can ensure that charges remain just and reasonable. As the Commission has recognized, in such a circumstance, regulation is not necessary to ensure just and reasonable rates.⁶⁰

The second prong of the forbearance test requires that “enforcement of such regulation or provision is not necessary for the protection of consumers.”⁶¹ Consumers benefit from choice, efficiency, and innovation, all of which will be more likely to occur in a competitive market without regulation. Accordingly, the Commission has properly relied on evidence of robust competition to protect consumers, and those policies have been wildly successful.⁶² In particular, the Commission’s hands-off approach to the Internet and to wireless has benefited

⁵⁸ See *supra* notes 11-12, 14-22.

⁵⁹ *Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems*, Notice of Inquiry, 18 FCC Rcd 8498, Statement of Chairmen Michael K. Powell (2003) (“Broadband over Power Line has the potential to provide customers with a ubiquitous third broadband pipe to the home.”).

⁶⁰ *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, Report and Order, 95 F.C.C.2d 1276, 1301, ¶38 (1983) (recognizing “that the advent and growth of competition in a particular market eliminates the need for continued regulation”).

⁶¹ 24 U.S.C. §160(a).

⁶² See *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers Transport Rate Structure and Pricing End User Common Line Charges*, Report and Order, 12 FCC Rcd 15982, ¶263 (1997) (*Access Charge Reform Order*) (“[A]dopting a primarily market-based approach to reforming access charges will better serve the public interest . . .”).

consumers by allowing for the growth of new providers and the ability to choose alternative voice communications, which has spurred competition.

Finally, the public interest affirmatively requires that the FCC forbear from applying economic regulation to VoIP services. The public interest is served by efficiency, innovation, and consumer choice, all of which will occur if the Commission does not strangle the IP marketplace with Title II economic regulation.⁶³ Simply put, as the Commission has previously found in analogous circumstances, it would be contrary to the public interest to impose unnecessary regulatory costs and burdens on a competitive market.⁶⁴

Indeed, it would be particularly contrary to the public interest to impose such unnecessary obligations asymmetrically on only some providers of IP-enabled services. In this regard, USTA agrees with SBC that “[T]itle II regulation would distort the workings of these market forces by imposing new costs on some participants but not others, interfering with the cooperative business relationships of the various market participants, and discouraging some types of new entrants from taking advantage of the openness of IP platforms to enter or offer new and diverse services.”⁶⁵

⁶³ *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, Report and Order, 95 F.C.C.2d 1276, 1301, ¶38 (1983).

⁶⁴ *Id.* (noting that regulation can “distort the workings of the market by imposing costs on market participants which they otherwise would not have to bear”); *see also Access Charge Reform Order*, ¶ 263 (stating that competition in an open market “should minimize the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets”).

⁶⁵ *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Petition of SBC Communications Inc. for Forbearance, WC Docket No. 04-29, at 5 (filed Feb. 5, 2004) (SBC Petition).

While these principles require forbearance from Title II economic regulation,⁶⁶ the public interest continues to require Commission regulations that protect consumers, public safety, and national security. Indeed, to the extent necessary, those rules should be expanded to cover all IP-enabled service providers.

b. ILEC-Provided VoIP Services Are Non-Dominant.

Under the Commission's rules, a dominant carrier must have market power as evidenced by "the ability to raise and maintain prices above the competitive level" without sacrificing market share.⁶⁷ Market power analysis also considers relevant supply and demand elasticities.⁶⁸

⁶⁶ Recently, the Ninth Circuit in the *Brand X* decision held that broadband access service that includes a telecommunications component is Title II common carriage. See also *AT&T Declaratory Ruling and Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Inquiry*), *rev'd on other grounds sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003). Until the appellate process is completed, uncertainty will exist as to the classification of a telecommunications component and whether it should be classified as Title II common carriage. We agree with SBC that the FCC "should dispel the legal uncertainty created by *Brand X* . . . and restore a stable deregulatory environment for IP platform services as a whole by exercising its considerable discretion under Section 10 to forbear" from applying Title II economic regulation to VoIP providers." SBC Forbearance Petition at 3. Alleviating this regulatory uncertainty is necessary to allow a "stable and predictable federal regulatory environment" and "conducive to continued investment" in this emerging sector. *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1421, ¶25 (1994); see also *AT&T Declaratory Ruling and Cable Modem Inquiry*, ¶5 (acting to "remove regulatory uncertainty that in itself may discourage investment and innovation"); *Triennial Review Order*, 18 FCC Rcd 16978, 17519 (Statement of Chairman Michael K. Powell) (warning the lack of "clear and sustainable rules" may result in "a molten morass of regulatory activity that may very well wilt" new investments); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 449, ¶12 (1981) (noting that regulation may negatively impact consumer welfare).

⁶⁷ See 47 C.F.R. §61.3(q) (defining a dominant carrier as having market power and the ability to control prices); see also *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 F.C.C.2d 554, 558, ¶7 (1983), *vacated AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI*

ILECs have no market power in the IP-enabled services market, including VoIP services, or in the broadband transmission market, and are therefore non-dominant in both the retail and wholesale markets. The Commission should so declare.

As USTA has discussed, consumer IP-enabled services are now available from cable operators, CLECs and interexchange carriers, and upstart application providers such as Vonage. Nearly ninety percent of all households in the United States now have access to a broadband connection.⁶⁹ Cable operators' networks alone reach approximately eighty-five percent of all U.S. households, and each of the six major cable providers now provides (or will shortly) IP telephony service.⁷⁰ CLECs and interexchange carriers including AT&T, MCI, and Z-Tel have

Telecommunications Corp. v. AT&T, 509 U.S. 913 (1993) (defining market power as the ability to raise prices and restrict output); and see *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5890 (1991) (generally describing the process of competitive entry).

⁶⁸ Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 F.C.C.R. 3271, ¶38 (1995) (*AT&T Non-Dominant Motion*).

⁶⁹ See *Broadband Services*, National Cable & Telecommunications Association at <http://www.ncta.com/Docs/PageContent.cfm?pageID=37>; see also J Halpern et al., *Broadband Update: DSL Share Reaches 40% of Net Ads in 4Q . . . Overall Growth Remain Robust*, Bernstein Research Call at 7 (Mar. 10, 2004).

⁷⁰ See J. Halpern et al., *US Telecom & Cable: Faster Roll Out of Cable Telephony Means More Risk to RBOCs; Faster Growth for Cable*, Bernstein Research Call at 2 (Dec. 17, 2003).

begun deploying VoIP services with others soon to follow.⁷¹ New companies that do not offer traditional voice service now offer nationwide telephony in virtually all major markets.⁷²

Adding to this environment, VoIP services are now competitive with traditional circuit-switched networks, providing more functions and flexibility, usually at lower consumer prices. For customers with an existing broadband connection, studies indicate that migration to VoIP service can save nearly \$100 per year at current cost levels.⁷³

Based on these facts, it is clear that ILECs lack any appreciable market power in the VoIP market or the market for IP-enabled services. Accordingly, ILECs that provide retail or wholesale VoIP should not be subjected to dominant carrier regulation for those services⁷⁴ and any dominant carrier requirements currently applied to them for the provision of VoIP services⁷⁵ should be eliminated.

⁷¹ See, e.g., AT&T News Release, *AT&T's CallVantage Service Expands to Serve the Western United States* (May 17, 2004), MCI Press Release, *MCI Provides 2004 Financial Guidance* (Jan. 22, 2004), Z-Tel News Release, *Z-Tel to Launch Voice Over IP Services* (Feb. 9, 2004), and Level 3 Press Release, *Level 3 Launches Residential VoIP Service in More than 50 U.S. Markets* (May 3, 2004).

⁷² See Vonage Press Release, *Vonage Drops Residential Premium Unlimited Plan by \$5 to \$29.99* (May 17, 2004); see also *About Vonage: Fast Facts* at http://www.vonage.com/corporate/aboutus_fastfacts.php.

⁷³ See Parks Associates, *VoIP Key to Boosting Broadband Adoption*, Business Wire (Feb. 10, 2004).

⁷⁴ *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14246, ¶49 (describing non-dominant classification).

⁷⁵ *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1421, ¶25 (1994) (explaining that tariff mandates increase administrative costs and delay the introduction of new services); see also *AT&T Non-Dominant Motion*, 11 F.C.C.R. 3271, ¶27 (1995).

2. Information Services

To the extent that IP-enabled services qualify as information services, the Commission should ensure that they are deregulated by, among other things, waiving the *Computer Inquiry* rules as they apply to wireline providers, and ensuring that, as to important issues such as access charges and universal service, all IP-enabled service providers are put on an equal footing.

a. The Commission Should Deregulate and Waive the *Computer Inquiry* Requirements.

The Commission has established that the proper use of its Title I authority as applied to information services is to enforce a policy of deregulation. As the Commission said in *Computer II*, “the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network.”⁷⁶

The Commission’s authority – indeed, its duty – to maintain the deregulated status of information services is all the more clear after the passage of the 1996 Act. Congress has now made clear that the policy of the United States is to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”⁷⁷ And if that were not enough, section 706 of the 1996 Act charges the Commission with “encourag[ing] the deployment of advanced telecommunications capability to all Americans” through measures that “promote competition” and “regulating methods that

⁷⁶ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 387, ¶7 (1980) (*Computer II*) (emphasis added).

⁷⁷ 47 U.S.C. §230(b).

remove barriers to infrastructure investment.”⁷⁸ Imposing burdensome regulations on the enhanced functionalities that use advanced telecommunications capability would undoubtedly discourage deployment of, and investment in, those facilities, directly contrary to Congress’s announced policy.

In one key respect, the Commission must deregulate information services beyond what it did before the passage of the 1996 Act, the dawn of the Internet, and the development of broadband technologies: the Commission must waive the *Computer Inquiry* rules for IP-enabled services.

In an earlier era where information services were provided over a single wire, it arguably made sense to impose the sorts of nondiscrimination and network sharing requirements that the *Computer* decisions establish. But in the context of broadband today, that core assumption of the *Computer* decisions no longer exists. As the Commission has stated, “the one-wire world for customer access appears to no longer be the norm in the broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services.”⁷⁹ Accordingly, as the Commission has explained, the “legal, technological, and market circumstances” that gave rise to the *Computer* rules are “very different” from those that exist in broadband today.⁸⁰

⁷⁸ 47 U.S.C. §157 nt.

⁷⁹ *Broadband Non-Dominance NPRM*, ¶5.

⁸⁰ *Wireline Broadband NPRM*, ¶35.

Because of those differences, the Commission has squarely held that it would waive application of the *Computer* requirements to market-leading cable modem providers.⁸¹ The Commission determined, among other things, that it would be contrary to the congressional policies expressed in section 230 and section 706 to apply those rules to cable providers.⁸²

If these requirements are not necessary in the broadband context for the market leaders – the parties that this Commission’s own statistics show provide for more than two-thirds of the market – the Commission must similarly exercise its authority under 47 C.F.R. § 1.3 to waive these same requirements as to the secondary providers of the broadband transmission used in IP-enabled information services. It is simply illogical to exempt market leaders from these rules, but nevertheless to impose them on the minority wireline providers.

Nor are these asymmetrical requirements mere harmless relics of a different era in the telecommunications world. On the contrary, the ILECs have provided substantial evidence to the Commission in the *Wireline Broadband NPRM* proceeding of the enormous engineering and other costs that they must incur in order to comply with these rules – for instance, BellSouth has provided detailed information showing that it spends as much as \$42 per broadband customer every year to comply with these duties.⁸³ Those unnecessary costs raise the rates of both wireline broadband customers *and* of cable broadband customers, because cable providers can

⁸¹ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶¶ 46-47 (2002) (*Cable Modem NPRM*).

⁸² See *id.*

⁸³ Letter from L. Barbee Ponder, IV to Marlene Dortch, Aug. 11, 2003, WC Docket No. 02-33, *et al.*

keep their rates artificially high knowing that their wireline competitors face this cost disadvantage.

This is, accordingly, the very kind of asymmetrical regulatory rule that warps competitive markets and puts to this Commission the task of determining winners and losers in the marketplace. The Commission should rectify the asymmetry by waiving *Computer* obligations for all wireline IP-enabled information services as well as for all other ILEC information services that employ broadband transmission. By deregulating these services, the Commission would be affording ILECs the opportunity to structure their broadband transport service offerings (e.g., DSL) according to the needs of their customers – whether that is on a private or common carriage-basis.

b. ILECS Must Be Afforded Regulatory Flexibility.

ILECs that choose the option of providing broadband services on a common carriage-basis would be required to make their DSL service available to all customers in a service area on an indiscriminate basis, but they would also preserve the ability to offer the service as a tariffed common carrier transport service both in and outside of the NECA pool. By providing ILECs with the flexibility to select the most suitable regulatory framework for broadband transport services based on their business needs, ILECs, and rural ILECs in particular, will be encouraged to continue deployment of DSL services. Similarly, such increased flexibility will facilitate national broadband deployment objectives.

c. Access Charges Should Be Applied Even-Handedly to All IP-Enabled Service Providers.

The Commission should similarly ensure parity of treatment among providers of analogous services by requiring that all IP-enabled service providers that use local networks to

originate or terminate interexchange voice calls should pay the same access charges. As the NPRM forthrightly concludes, “[a]s a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the *cost of the PSTN should be borne equitably among those that use it in similar ways.*”⁸⁴

To effectuate that correct conclusion, the Commission must establish that access charges apply to all interstate IP-enabled calls that are originated or terminated on the PSTN, regardless of whether the particular IP-enabled service is an information service or telecommunications service. The Commission plainly has the authority to impose such an obligation under Title I as well as under Title II. Indeed, the fact that the Commission has “exempted” information service providers from some interstate access charges necessarily shows that the Commission has the authority to impose a duty but has simply chosen not to do so.⁸⁵

In any event, Title I provides the Commission with authority to “perform any and all acts, make such rules and regulations, issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions.”⁸⁶ Since those functions include, among other things, ensuring “rapid, efficient, Nation-wide wire and radio communications services *with adequate facilities at reasonable charges,*”⁸⁷ applying access charges across-the-board to all

⁸⁴ NPRM, ¶61 (emphasis added).

⁸⁵ See, e.g., *Access Charge Reform Order*, ¶343.

⁸⁶ 47 U.S.C. §154(i).

⁸⁷ 47 U.S.C. §151 (emphasis added).

similarly situated competitors in order to maintain reasonable rates and avoid discrimination against a subset of providers is plainly within the Commission's power.⁸⁸

d. The Commission Should Ensure Even-Handed Application of Universal Service and other Social Priorities Under Title I.

As the D.C. Circuit has explained, "Congress sought to endow the Commission *with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.*"⁸⁹ The Supreme Court has likewise held that Title I is a core element of the "comprehensive mandate" that Congress has given to this Commission to ensure rational treatment of "a field that was demonstrably both new and dynamic."⁹⁰

These "elastic" powers are certainly broad enough to permit the Commission to impose the same obligations to preserve social priorities, including universal service, E911, disabilities access, consumer protection and assistance to law enforcement on IP-enabled information services as are applied to the telecommunications services that the IP based services are replacing and with which they compete. It is necessarily "reasonably ancillary"⁹¹ to the Commission's authority over those telecommunications services to impose analogous obligations on competing services to ensure a competitive level playing field and the preservation of

⁸⁸ In this regard, USTA is aware that the Commission is considering reform of the existing interstate access charges in its *Inter-carrier Compensation* docket, and USTA and its members have filed comments there. The specifics of that reform should, of course, be resolved there, but the key point for present purposes is that whatever compensation device exists, it should be applied even-handedly to all similar users of the PSTN, regardless of whether a call originates from (or terminates to) an IP or cable network and regardless of whether the service received by the end-user is an IP-enabled information service.

⁸⁹ *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d at 213 (internal quotation marks omitted).

⁹⁰ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968).

⁹¹ *Cable Modem NPRM*, ¶75.

congressional priorities. The specific steps the Commission should take on these issues are discussed in detail in Part IV below.

III. THE COMMISSION SHOULD ESTABLISH THAT THE VOIP MARKET IS INTERSTATE AND NOT SUBJECT TO STATE REGULATION

Despite the abundant benefits of allowing competition to flourish in the fast-growing IP-enabled services market without the drag of unnecessary regulation, state commissions around the country have already indicated their desire to impose regulatory burdens on IP providers. Indeed, a recent report indicated that “at least twenty-five states, including Minnesota and California, are currently in the process of drafting rules for the regulation of VOIP services.”⁹² The Commission can and should act now to make plain that all these attempts at regulation are *ultra vires*, contrary to national policy, and preempted.

In its recent *Pulver* decision, the Commission reiterated that its authority over a service is *exclusive* unless that service is (1) “purely intrastate” or (2) it is “practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component.”⁹³ There can be no argument that IP-enabled services, whether telecommunications services or information services, are “purely intrastate.” On the contrary, these services run over the Internet and similar interstate

⁹² Timothy H. Ehrlich, *United States: FCC Takes First Steps Towards Clarifying Regulatory Treatment of Voice-Over-IP Services*, Latham & Watkins LLP, Mondaq’s Article Service at <http://www.mondaq.com/article.asp?articleid=25827&searchresults> (May 4, 2004).

⁹³ *Pulver Order*, ¶20.

networks and allow calling across the nation and the world. As the Commission has held, “most Internet-bound traffic . . . is indisputably interstate in nature.”⁹⁴

It is also not practically possible to separate the interstate and intrastate components of IP-enabled services. Among other things, this is because, as *Pulver* explains, IP addresses are portable and the “physical locations” of consumers using IP-enabled services can change.⁹⁵ Even if it were possible to determine that specific IP-enabled calls were intrastate, that would require determining the physical locations of users on each call, a process that would “forc[e] changes on the service for the sake of regulation itself.”⁹⁶

In any event, the Commission has already decided that the broadband transmission used for IP-enabled services is subject to the authority of this Commission and not 50 disparate state authorities. The Commission held in the *GTE Tariff Order* that broadband transmission for Internet access is a form of special access, and, as with other special access services over which more than 10% of the traffic is interstate, falls within this Commission’s *exclusive* jurisdiction

⁹⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶58 (2001) (*ISP Remand Order*).

⁹⁵ *Pulver Order*, ¶20.

⁹⁶ *Id.*, ¶¶ 21-22.

under the “mixed use” doctrine.⁹⁷ Indeed, the Commission concluded that that finding obviated any need to determine whether state regulation was also preempted on other grounds.⁹⁸

Finally, as the Commission stressed in *Pulver*, the Commerce Clause prevents states from imposing a burden on interstate commerce that is “‘clearly excessive in relation to the putative local benefits.’”⁹⁹ Here, the burden of state economic regulation on interstate commerce would be extraordinary, as the states would be undermining the deregulation that the Commission has determined in related contexts (and should determine here) creates the best environment for investment in and deployment of interstate IP-enabled services. At the same time, given the highly competitive nature of these markets, there can be no substantial benefit to local economic regulation. In a properly functioning market such as this one, competition itself is already ensuring just and reasonable rates and the absence of unreasonable discrimination. Economic regulation serves no purpose in those circumstances, and the Commission should use its authority to preempt it.

IV. THE COMMISSION SHOULD ENSURE THAT ALL PROVIDERS MEET THE SAME SOCIAL RESPONSIBILITIES

The Commission also seeks input on crucial issues of universal service, public safety, national security, consumer protection and pricing, and how carrier compensation should be applied to IP-enabled services. These issues are central to national policy. American citizens

⁹⁷ *GTE Telephone Operating Cos., GTE Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶19 (1998) (*GTE Tariff Order*).

⁹⁸ *Id.*, ¶ 28 (“In light of our finding that GTE’s ADSL service is subject to federal jurisdiction under the Commission’s mixed use facilities rule and properly tariffed as an interstate service, we need not reach the question of whether the inseverability doctrine applies.”).

⁹⁹ *Pulver Order*, ¶24 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

should be assured that communications companies are providing appropriate help to law enforcement. They should also be assured that they will be able to obtain emergency police, fire, and medical assistance through 911. And they should also be assured of universal access to basic phone service at reasonable rates.

Congress has codified these and other social goals in federal law. This Commission must effectuate those policies by requiring all providers of IP-enabled services to assume these same social obligations.

A. The Commission Should Ensure that Universal Service Is Adequately Funded

In order to maintain the viability of the Universal Service Fund, the Commission must broaden the base of contributors to the Fund and regulators must rigorously apply the public interest test in designating eligible telecommunications carriers and determining the appropriate level of support.

First, the Commission should broaden the contribution base by requiring all IP-enabled service providers, including providers of VoIP services, and other Internet service providers to contribute in a similar manner. There must be parity in the contribution methodology of all contributors to USF.

Second, the Commission should establish mandatory guidelines for determining when it is in the public interest to designate an additional eligible telecommunications carrier that may receive universal service support. These guidelines must require regulators to look at more than the possibility of increased competition as a reason for designating an additional ETC. Among other things, they must consider the impact that an additional ETC would have on the size of the Fund and whether the applicant ETC is financially stable, can provide all elements of defined

universal and lifeline services, has a published tariff and sufficient build-out plans for its network, is ready and able to serve all customers in an area as the carrier of last resort, and will comply with all applicable service quality standards and reporting requirements. Only carriers that provide voice services over their own high-cost facilities and that meet the ETC designation requirements, including providers of voice services that are provided over IP, should be entitled to receive universal service support.

B. The Commission Should Ensure Disability Access

Implementation of section 255 of the Act, which promotes access to telecommunications equipment, CPE and telecommunications services for people with disabilities, is an FCC priority. Under section 255, “a provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.” Section 255, on its face, only applies to telecommunications service.

In the *Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities* proceeding,¹⁰⁰ the Commission properly interpreted section 255 to include information services. In this proceeding, the Commission should build on that conclusion to establish, that under section 255 (or if necessary Title I ancillary jurisdiction) disabilities access requirements should apply to all providers of IP-enabled voice services. Telecommunications and computer equipment are critical tools that disabled Americans must have access to in order to communicate, and lead productive and meaningful lives. The Commission has the authority, and has exercised that authority in the past,

¹⁰⁰ See *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry, WT Docket No. 96-198, FCC 99-181 (rel. Sept. 29, 1999).

to require that information services must comply with section 255. The public interest requires no less.

The Commission should similarly ensure broad access to Telecommunications Relay Service (TRS). Section 225 of the Act requires common carriers to provide TRS that permits persons with disabilities to have equal access to the telecommunications network. The FCC has determined “that two IP-enabled services, IP Relay and Video Relay Service (VRS), are forms of TRS.”¹⁰¹ The Commission construed the terms “telecommunications” and “telephone transmission” services to include IP-enabled services under section 225 of the Act to “ensure that interstate and intrastate [TRS] are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech impaired individuals in the United States.”¹⁰²

Section 225 should apply to all providers of IP-enabled voice services. The ability to have access to TRS is critical for the hearing-impaired and speech-impaired. The Commission has already extended section 225 authority to IP Relay and Video Relay Service and should rely on the same statutory authority or its ancillary jurisdiction to impose the same obligation on all IP-enabled voice services.

C. The Commission Should Ensure Broad Access to 911/E911

All providers of voice communications must comply with 911/E911 capabilities. Simply put, public safety requires that United States citizens have access to 911/E911 services in the

¹⁰¹ NPRM, ¶59.

¹⁰² *Id.*, citing to *Provision of Improved Telecommunications Relay Services and Speech-To-Speech Services for Individuals with Hearing and Speech Disabilities; Petition for Clarification of WorldCom, Inc.*, CC Docket No. 98-67, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779, 7783, ¶10 (2002).

event of an emergency. Carriers have a solemn obligation to ensure ready access to emergency assistance, and IP-enabled carriers should not be exempt from that obligation.

The Commission has correctly explained that the Wireless Communications and Public Safety Act of 1999¹⁰³ tasks it with “facilitat[ing] the prompt deployment of a seamless, ubiquitous, and reliable end-to-end infrastructure” for wireline and wireless phone providers, so that citizens can reach emergency services in the event of a crisis. Congress has thus given the Commission the authority to facilitate the deployment of 911/E911 services, and the Commission should exercise that authority to require industry to develop 911 standards for IP-enabled services. The FCC should also develop enforcement mechanisms to ensure that IP-enabled providers comply with those standards. Among other things, the Commission should require that IP-enabled service providers that have a direct retail relationship with the end user customer be responsible for delivering 911 calls to PSAPs, regardless of the technology, network architecture, network facilities, corporate classification or industry/governmental certification.

Although the Commission should establish the standards that must be met and the functionalities that all IP-enabled service providers have an obligation to provide, it should also encourage voluntary industry efforts to develop network solutions, interoperability standards, and best practices and to create PSAP communications solutions for IP-enabled services. Indeed, the industry has already started work to meet these challenges. Industry efforts are underway to make IP-enabled services technically and operationally capable of complying with the Commission’s basic 911 service rules. These efforts seek to ensure that calls are directed to the appropriate public safety answering point (PSAP) and that IP-enabled services

¹⁰³ Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (codified at 47 U.S.C. §§222, 251(e)).

are technologically and operationally capable of delivering call-back and location information. Finally, because E911 is not technically feasible today, the Commission should require basic 911 service and then, once the industry develops a solution for E911, those requirements should be implemented.

D. The Commission Should Undertake a Rulemaking on CALEA

The Communications Assistance for Law Enforcement Act (CALEA) was passed by Congress in October of 1994. The enactment of CALEA was designed to preserve law enforcement's ability to conduct lawfully authorized electronic surveillance in today's evolving telecommunications networks.

On March 10, 2004, the Federal Bureau of Investigation, U.S. Department of Justice, and U.S. Drug Enforcement Administration filed a Joint Petition for Expedited Rulemaking (Law Enforcement Petition)¹⁰⁴ with the FCC, on which the FCC has already sought comments.¹⁰⁵ Law Enforcement's Petition requests that the FCC make a declaratory ruling and initiate an expedited rulemaking proceeding to resolve numerous outstanding CALEA implementation issues. Law Enforcement's Petition proposes a number of dramatic changes in the classification of services and procedures relating to new technologies, the setting of benchmarks and deadlines for compliance, penalties, and allocations of costs. Most notably, Law Enforcement seeks to identify the services that are considered "packet mode services" and have the FCC issue a

¹⁰⁴ *United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration; Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act*, Joint Petition for Expedited Rulemaking, RM No. 10865 (filed Mar. 10, 2004).

¹⁰⁵ Public Notice, *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, DA No. 04-700 (Mar. 12, 2004).

Declaratory Ruling finding that broadband access services and broadband telephony services are subject to CALEA.

Law Enforcement has raised important issues, but the Commission must carefully consider how these legitimate objectives can be met without impeding technological innovation. USTA thus urges that the Commission undertake a rulemaking to address all of these matters rather than making a declaratory ruling.¹⁰⁶

E. The Commission Should Preserve Consumer Protection Requirements

Consumer protection safeguards should apply to all voice service providers. The Commission should thus make clear that customer proprietary network information (CPNI), Slamming, and Truth-in-Billing requirements should be extended to subscribers of IP-enabled voice services in the same manner that such requirements apply to LECs. There is no legitimate reason why consumer protection rules should not apply across the board to all providers, regardless of technology. Anything less would diminish the protections that federal law affords consumers and would invite abuse. That result, of course, would undermine the public interest and serve no legitimate policy goal.

CONCLUSION

The innovative and competitive future of IP-enabled services depends on the ability of all companies to offer their services on an equal basis, free of economic regulation and subject to

¹⁰⁶ See *United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration; Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act*, Comments of the United States Telecom Association, RM No. 10865 (Apr. 12, 2004) and *United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration; Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act*, Reply Comments of the United States Telecom Association, RM No. 10865 (Apr. 27, 2004).

the will of the market, but also recognizing the obligation of all such companies to meet their social responsibilities. USTA urges the Commission to ensure that the regulatory environment applied to IP-enabled services, as advocated here, will foster continued technological innovation and market competition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on May 28, 2004, the aforementioned Comments of The United States Telecom Association were electronically filed with the Commission through its Electronic Comment Filing System and were electronically mailed to the following:

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